IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated.: 27.10.2006

CORAM:

THE HONOURABLE MR. JUSTICE K.MOHAN RAM

Second Appeal No.1104 of 2006
and M.P.No.1 of 2006

1. Ponnan
2. Smt. Rangammal
3. Ponnusamy
4. P.Sinnalaghu .. Appellants/Defendants

-Vs-

1. Peraman
2. Raji .. Respondents/Plaintiffs

APPEAL filed under section 100 of the code of Civil Procedure against the judgment and decree of the Subordinate Judge's Court at Dharmapuri dated 28.07.2006 in A.S.No.52 of 2005 confirming the judgment and decree of the District Munsif Court at Dharmapuri dated 17.11.2004 in O.S.No.254 of 2000.

For Appellants : Mr. P.Valliappan.

- - -

J U D G M E N T

The unsuccessful defendants in O.S.No.254 of 2000 on the file of the District Munsif Court, Dharmapuri are the appellants in the above appeal.

2. For the sake of convenience the parties are referred to as per their ranking in the suit.

3. The case of the plaintiffs is as follows:-

The lands in Survey No.307/6 of Mathemangalam village belongs to the plaintiffs. The second plaintiff purchased survey No.307/5 from the first defendant's brother-Kaveri and his son-Sakthivel under a registered sale deed dated 31.01.1994 together with the mamool pathway (suit pathway). An extent of 25 cents in Survey No.307 and a common right in the well in Survey No.307/6 and the right in the suit common pathway were purchased by the first plaintiff's father from one Periannan under a registered sale deed dated 21.05.1946 and since

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

then he was enjoying the same and thereafter the plaintiffs are enjoying the same. The suit pathway runs west to east from the Aavarangattur road on the south of Survey No.307/4 and it reaches Survey Nos.307/5 and 307/6 and the same is being used by the plaintiffs and the defendants and earlier the same was being used by their predecessors in interest for well over 50 years as a pathway and for taking cattle and cart when no crops were raised. The suit pathway is shown as 'A,B,C,D' in the plaint plan. It is the further case of the plaintiffs that except this suit pathway there is no other convenient pathway to reach Survey Nos.307/5 and 307/6. The patta for survey No.307/4 stands in the name of the first defendant. Since the defendants are interfering with the right of the plaintiffs to use the common suit pathway a police complaint was given and a legal notice was also issued for which a reply notice was sent by the defendants containing false averments, hence the suit has been filed seeking declaration and injunction.

4. A detailed written statement has been filed by the first defendant which has been adopted by the other defendants. In the written statement the averments contained in the plaint have been denied. The defendants have denied the very existence of the suit pathway and they have pleaded that on the south of Survey Nos.307/5 and 307/6 a 'Odai Pathai' runs through Survey No.306 and the same has been sub-divided as 306/2 and further on the east of the said lands another 'Odai pathai' is there in Survey No.322 and the plaintiffs can reach their lands in Survey Nos.307/5 and 307/6 through the pathway in Survey No.306/2 and Survey No.322 and those pathways alone are being used by the plaintiffs for a long time and there is absolutely no necessity to go through the lands in Survey No.307/4 to reach their lands. They have also pleaded that the alleged cause of action is not true.

5. On the basis of the above said pleadings the trial court framed the following issues:-

(i) Whether the plaintiffs are entitled to get declaration and injunction?
(iii) To what relief the plaintiffs are entitled to?

6. During trial on the side of the plaintiffs the second plaintiff was examined as P.W.1 and one Dhanapal and Kandaswamy were examined as P.Ws.2 and 3 and Exs.A-1 to A-10 were marked and on the side of the defendants the fourth defendant was examined as D.W.1 and Ex.B-1 to B-11 were marked. The Advocate Commissioner's report and rough sketch were marked as Exs.C-1 and C-2. On a careful consideration of the oral and documentary evidence available on record and the Commissioner's report and sketch the trial court decreed the suit as prayed for. Being aggrieved by that the defendants filed A.S.No.52 of 2005 before the Sub-Court, Dharmapuri.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

The lower appellate court dismissed the appeal. Being aggrieved by that the above second appeal has been filed.

7. Heard Mr. P.Valliappan learned counsel appearing for the appellants.

8. The learned counsel for the appellants submitted that when admittedly an alternative and convenient pathway is available to Survey Nos.307/5 and 307/6 there was no necessity at all for the plaintiffs to use the suit pathway. The learned counsel further submitted that though a right has been given to the plaintiffs under Ex.A-1-sale deed dated 21.05.1946 in respect of the pathway running through Survey No.307/4 the plaintiffs have not established that they are continuing to use the same. The learned counsel further submitted that the Courts below have not properly considered the objections filed by the defendants to the Commissioner's report and plan.

9. The dispute is only with respect to the 'A,B,C,D' common pathway which is running through Survey No.307/4. The contention of the defendants that the plaintiffs are using the alternative pathway in Survey Nos.322 and 306/2 has been rejected for the reason that the same is not fit to be used as pathway and for taking carts. P.Ws.2 and 3 have categorically stated that Survey Nos. 322 and 306/2 are only 'Oonis'/channels and they cannot be used as a pathway. The Courts below have also pointed out that the Advocate Commissioner has also not stated in his report about the possibility of reaching Survey Nos.307/5 and 307/6 through Survey Nos.322 and 306/2. The Courts below have also pointed out that in Exs.A-1 to A-3, Survey No.322 has been described only as a 'Ooni' and not as a pathway.

10. A perusal of the judgments of the Courts below shows that both the Courts below have carefully analysed Exs.A-1 to A-3 and Exs.C-1 and C-2 and Exs.A-9 series, the deposition of P.Ws.1 to 3 and the admission of D.W.1 and have recorded a finding that the suit pathway starts in Survey No.307/4 near the school and it runs through S.F.Nos.307/4, 307/5 & 6 and it reaches the end of S.F.Nos.307/5 & 6.

11. The contention of the learned counsel for the appellants that though in Ex.A-1 right of way has been given the same has been lost by the plaintiffs by non-user is not based on any pleadings. In the written statement such a plea has not been specifically taken and D.W.1's evidence also does not help the case of the defendants. The Courts below on a consideration of the recitals contained in Ex.A-1-sale deed have pointed out that from 1946 onwards a right on the north of S.F.No.307 has been given and on a consideration of Exs.C-1 and C-2 and on the basis of Ex.A-9 series the Courts below have recorded a finding about the existence of a common pathway on the ridge and have further pointed out that it runs up to the end of the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

Survey Nos.307/5 and 307/6. The Courts below have also pointed out that pursuant to Ex.A-1 the plaintiffs and their predecessors in interest were enjoying the right over the common pathway without any hindrance right from 1946. The Courts below have pointed out that the right given under Ex.A-1 is an easement of grant expressly granted to the plaintiffs and the same is continuously being enjoyed by the plaintiffs. When the plaintiffs are claiming a right over the suit pathway as an easement of grant the Courts below have rightly pointed out that there is no need to consider the availability of alternative pathway to reach the plaintiffs lands.

12. It has to be pointed out that the question whether an easement is one acquired by grant (as contrasted from an easement of necessity) does not depend upon absolute necessity of it. It is the nature of the acquisition that is relevant. Many easements acquired by grant may be absolutely necessary for the enjoyment of the dominant tenement in the sense that it cannot be enjoyed at all without it. That may be the reason for the grant also. But easement of grant is a matter of contract between the parties. In the matter of grant the parties are governed by the terms of the grant and not by anything else. Easement of necessity and quasi-easement are dealt with in Section 13 of the Act. The grant may be express or even by necessary implication. In either case it will not amount to an easement of necessity under Section 13 of the Act even though it may also be an absolute necessity for the person in whose favour the grant is made. Limit of the easement acquired by grantis controlled only by the terms of the contract. If the terms of the grant restrict its user subject to any condition the parties will be governed by those conditions. Anyhow the scope of the grant could be determined by the terms of the grant between the parties alone.

13. When both the Courts below on an analysis of the oral and documentary evidence available on record have concurrently found the existence of pathway in Survey No.307/4 and about its user by the plaintiffs, this Court exercising power under Section 100 of the Code of Civil Procedure cannot interfere with the concurrent findings of fact. It is not the contention of the learned counsel for the appellants that the findings of the Courts below are perverse or not based on evidence.

WEB COPY

14. The Apex Court has time and again pointed out that even in a case where from a given set of circumstances two inferences of fact are possible, the one drawn by the lower appellate court will not be interfered by the High Court in second appeal. Further in this case another view or inference is not possible to be drawn from the evidence on record in this case and hence this Court cannot, in a second appeal, interfere with the findings of the lower appellate court. The questions of law raised in the memorandum of grounds are not substantial questions of law and in my considered view no

https://hcservices.ecourts.gov.in/hcservices/

question of law much less substantial question of law arises for consideration in the above appeal.

15. For the reasons stated above, this Court is not inclined to interfere with the concurrent findings of facts recorded by the Courts below. For the said reasons, the above appeal fails and the same is dismissed. No costs. Consequently, the connected MP is closed.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

srk

To

1. The Sub-Court, Dharmapuri
2. The District Munsif Court, Dharmapuri

+1cc to Mr.P.Valliappan, Advocate Sr 50320

RNA (CO)
km/20.12.

S.A.No.1104 of 2006
and M.P.No.1 of 2006

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/